87-1512

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1987

BENACQUISTA, POLSINELLI AND SERAFINI MANAGEMENT CORP.,

Petitioner,

-against-

SAVE THE PINE BUSH, INC.; REZSIN ADAMS, JOHN WOLCOTT, GREGORY BELL, MARK PLAAT, LYNNE JACKSON and GENE DAMM, as Officers Individuals and Taxpayers,

Respondents.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether or not the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, effectuated an unconstitutional result when it held that a residential subdivision approval obtained by Petitioner was invalid, on the grounds that the Petitioner failed to comply with the provisions of the State Environmental Quality Review Act (SEQRA) as set forth in Article 8 of the Environmental Conservation Law of the State of New York. Briefly stated, the Appellate Division held that the Petitioner's failure to *resolve* the ecological issue of establishing a minimum preserve acreage for the preservation of the Pitch Pine/Scrub Oak ecosystem located within the Pine Bush area of the City of Albany, New York, wherein Petitioner's parcel of land is located, constituted a SEQRA violation. The crux of the constitutional issue presented is whether the imposition of the stated condition, resolution of the ecological issue, to the lifting of the SEQRA land use restriction, effectuated a regulatory taking, depriving Petitioner of any economically viable use of its property without compensation, contrary to the Takings, Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *

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*Note: Petitioner Benacquista, Polsinelli and Serafini Management Corp. does not have any parent companies, subsidiaries nor affiliates pursuant to Rule 28.1 of the United States Supreme Court

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Hon. William H. Rehnquist, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Benacquista, Polsinelli and Serafini Management Corp., the Petitioner herein prays that a writ of certiorari issue to review the Order of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department dated and entered on August 10, 1987 in the underlying New York State Court action entitled "Mtr. of the Application of Save the Pine Bush, Inc.; Rezsin Adams, John Wolcott, Gregory Bell, Mark Plaat, Lynne Jackson and Gene Damm, as Officers, Individuals and Taxpayers, Plaintiff-Petitioners, against The Planning Board, The City of Albany and Benacquista, Polsinelli and Serafini Management Corp., Defendants-Respondents".

QUESTION PRESENTED

The question presented is whether or not the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, effectuated an unconstitutional result when it held that a residential subdivision approval obtained by Petitioner was invalid, on the grounds that the Petitioner failed to comply with the provisions of the State Environmental Quality Review Act (SEQRA) as set forth in Article 8 of the Environmental Conservation Law of the State of New York. Briefly stated, the Appellate Division held that the Petitioner's failure to *resolve* the ecological issue of establishing a minimum preserve acreage for the preservation of the Pitch Pine/Scrub Oak ecosystem located within the Pine Bush area of the City of Albany, New York, wherein Petitioner's parcel of land is located, constituted a SEQRA violation. The crux of the constitutional issue presented is whether the imposition of the stated condition, resolution of the ecological issue, to the lifting of the SEQRA land use restriction, effectuated a regulatory taking, depriving Petitioner of any economically viable use of its property without compensation, contrary to the Takings, Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

PARTIES

The parties hereto are identified in the full title of the action/proceeding previously commenced in the New York State Court entitled, "In the Matter of the Application of Save the Pine Bush, Inc.; Rezsin Adams, John Wolcott, Gregory Bell, Mark Plaat, Lynne Jackson and Gene Damm, as Officers, Individuals and Taxpayers, Plaintiff-Petitioner, against The Planning Board, The City of Albany and Benacquista, Polsinelli and Serafini Management Corp., Defendant-Respondent".

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The opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department dated July 30, 1987, reported at 130 NY AD2d 1, is printed in Appendix A at pages 25 - 29. The Order of the Appellate Division of the Supreme Court dated and entered August 10, 1987 is printed in Appendix B at pages 36 - 37. The Memorandum Decision of the Court of Appeals of the State of New York, denying Petitioner's Motion for Leave to Appeal, dated October 22, 1987 unreported to date is printed in Appendix A at page 24; the Court of Appeals Order implementing the Decision was dated and entered October 22, 1987 and is printed in Appendix B at page 35. The Memorandum decision of the Court of Appeals of the State of New York denying Petitioner's Motion for Reargument of its Motion for Leave to Appeal, dated December 23, 1987 and unreported to date is printed in Appendix A at page 24; the Court of Appeals Order implementing such Decision was dated and entered in December 23, 1987 and is printed in Appendix B page 34. In addition, the decision of the Hon. Edward S. Conway, Albany County Special Term Supreme Court dated November 19, 1986 (unreported), together with the Order and Judgment of the Hon. Edward S. Conway dated December 5, 1986 and entered in the Albany County Clerk's Office on December 9, 1986 are printed in Appendix A at pages 29 - 32 and Appendix B at pages 37 - 39, respectively.

STATEMENT OF JURISDICTION

The Order of the Supreme Court of the State of New York Appellate Division, Third Judicial Department was dated and entered August 10, 1987. As set forth in the preceding section Petitioner's two (2) Motions for Leave to Appeal to the Court of Appeals of the State of New York were seasonably made and denied on October 22, 1987 and December 23, 1987 respectively.*

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*Note: The Court of Appeals Orders dated October 22, 1987 and December 23, 1987 were never served upon Petitioner. Petitioner's counsel obtained copies of such Orders from the Clerk of the Court of Appeals on February 23, 1988.

The jurisdiction of this Court is invoked under 28 USC §1257(3) (see *Perry v. Thomas*, 96 L Ed 2d 426, at 435). That the Petition is timely pursuant to 28 USC §2101(c) and Rule 20.4 of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENT 5

No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property taken for public use, without just compensation.* [Emphasis Added]

CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENT 14, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its juridiction the equal protection of the laws.* [Emphasis Added]

STATUTES

The complete text of Environmental Conservation Law Article 8 known as the New York State Environmental Quality Review Act (hereinafter referred to as SEQRA), is set forth in Appendix C at pages 41 - 51.

STATEMENT

Following its introduction on August 14, 1984, and after a two year project review encompassing both site specific Environmental Impact Statements (EIS) as well as a Generic Environmental Impact Statement (GEIS) pursuant to SEQRA, on August 12, 1986, the Planning Board of the City of Albany approved the Karner Meadows Residential Subdivision (hereinafter referred to as KMRS) owned and developed by Petitioner. Prior to project approval, the Planning Board adopted SEQRA Findings of Fact, the full text of which is set forth in Appendix D at pages 54 - 62. The subdivision consisted of 234 single-family residential lots situate on 121 acres of land located within the Pine Bush area of the City of Albany, State of New York, a known area of ecological import. Notably, the land is zoned R-1 single-family residential and the proposed use is a principally permitted use. As approved, the project included a 37.7 acre on-site preserve and the number of approved lots represented less than one-half of the maximum number of lots permitted (548) under the applicable zoning ordinance.

In a related action entitled *Mtr. of Save the Pine Bush v. Albany*, 70 NY2d 193, at 200, the New York Court of Appeals described the Pine Bush area as follows, to wit:

> "The Pine Bush, partially within the City of Albany, contains the only remaining large Pine Barrens on inland sand dunes in the United States. Its unusual inland sand dune composition is the home of rare plant and animal species such as the endangered Karner Blue Butterfly (ECL §11-0535) which survives on the Blue Lupine, a plant indigenuous only to the Pine Barren. The record establishes that the Pine Bush has a number of distinct environmental characteristics worthy of protecting."

Notably, the decision of the Appellate Division of the New York Supreme Court, from which Petitioners bring this writ, adopted the quoted description of the Pine Bush made by the Court of Appeals (see *Save the Pine Bush v. Planning Bd.*, 130 AD2d 1, at 3).

Petitioner is not unmindful of the ecological significance of the Pine Bush area as identified in the preceding paragraph. The record demonstrates, however, that the Pine Bush area of the City of Albany is far from being in a pristine state. On the contrary, the area is highly developed with commercial office parks and residential developments. In fact, the record demonstrates that the KMRS site is literally surrounded by existing development. Immediately adjacent to the northerly boundary line of the site there are 12 commercial office buildings as well as 132± homes in the *Dunes* residential subdivision. On the east, there exists two nursing homes (Theresian House and Daughters of Sarah), 40 single family homes in the "Woodridge South" development along Gipp Road in Guilderland, 5 single family homes along Pine Lane in Albany, as well as 44 townhouses in the "Woodridge North", the latter development immediately abutting the easterly boundary of KMRS. The southerly boundary of KMRS abuts over 100 single family homes and 61 townhouses in Fort Orange Manor sections 1, 2 and 3 along Velina Drive in the Town of Guilderland. On the west, KMRS abuts the Karner Road Industrial Park, which consists of 10 warehouses and/or industrial buildings. (R-310) The constitutional arguments set forth below must be considered within the context of the real facts, in order to appreciate the posture in which this controversy is presented.

By Order and Judgment of the New York Supreme Court dated December 5, 1986 and entered December 9, 1986, affirmed by Order of the Appellate Division of the Supreme Court, Third Judicial Department, dated and entered August 10, 1987, the KMRS approval was vacated as violative of SEQRA. Inasmuch as the constitutional violations arise out of the state court's application of SEQRA, the principles underlying judicial review of a SEQRA determination must first be stated.

It is well settled that judicial review of SEQRA determinations is limited to a finding that the lead agency "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for their determination" (see *Chinese Staff and Workers Assn. v. City of New York*, 68 NY2d 359, 363-365; *Mtr. of Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 417). The hard look standard does not

authorize the court to conduct a *de novo* review but only a limited review as succinctly stated in *Mtr. of Jackson v. New York Urban Dev. Corp.*, supra at 417, as follows:

> "Our inquiry [to determine SEQRA compliance] is *tempered* in two respects. First, an agency's substantive obligations under SEQRA must be viewed in light of *a rule of reason*. "Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirement of SEQRA" (*Aldrich v. Pattison*, 107 AD2d 258, 266, supra; *Coalition Against Lincoln West, Inc. v. City of New York*, 94 AD2d 483, 491, aff'd 60 NY2d 805, *supra.*). The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal (see, *Webster Assoc. v. Town of Webster*, 59 NY2d 220, 228). Second, the Legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects and choosing among alternatives (see, e.g. ECL §8-0109[8]). *Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice*, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence." [Emphasis Added]

Consistent with the determination that SEQRA does not require a "particular result on any issue", the court also stated [SEQRA] "does not require an agency to impose every conceivable mitigation measure, *or any particular one*" (67 NY2d at 421-422). In addition, in *Mtr. of Save the Pine Bush v. City of Albany*, 70 NY2d 193, at 206, the New York Court of Appeals required that the cumulative environmental impact of the pending Pine Bush projects (including KMRS) be assessed but did not specify that the reviewing agency reach a particular result on any issue, nor impose any specific mitigation measure.

Recognizing that the State has a legitimate interest in protecting the environment, Petitioner finds no fault with any of the stated SEQRA principles set forth in *Chinese Staff and Workers Assn.*,

supra, *Jackson v. New York Urban Dev. Corp.*, supra., nor *Mtr. of Save the Pine Bush v. City of Albany*, supra., more fully set forth above. The balancing of social, environmental and economic concerns does not necessarily deprive a property owner of any economically viable use of his lands, but only that such use minimize to the fullest extent practicable adverse environmental impacts (ECL §8-0109[8]). Insistence upon appropriate SEQRA compliance does not a taking make.

In blatant disregard of the SEQRA balancing philosophy, however, the Appellate Division of the Supreme Court has gone too far in its application of SEQRA, by requiring that ecological issues not only be assessed but resolved prior to project approval, crossing over the fine line which exists between land use regulation as opposed to prohibition, depriving Petitioner of any economically viable use of their land without compensation, in violation of the "Just Compensation", "Liberty", "Due Process" and "Equal Protection" clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

The Appellate Division has effectuated the unconstitutional result by requiring *resolution* of the "minimum preserve" issue as follows:

> "Here, Supreme Court concluded that a 'hard look' cannot be said to have occurred without 'consider[ing] *the question of what is the minimum acreage that the Pine Bush ecology needs to survive' or 'the number of acres that is a minimum habitat in order for the Karner Blue butterfly to survive'.* We agree.
>
> While respondents and *BPS suggest that resolution of this issue is 'outside the scope of a generic EIS* [environmental impact statement]', we deem it precisely the kind of environmental issue that needs to be evaluated when, as here, the habitat of an endangered species is at risk (6 NYCRR 182.6[a][2]) and the municipality has opted for maximum development of the land area involved without proposing any substantively salutary mitigating measures which would minimize the adverse environmental effect of its decision; to allow the Board to do otherwise would frustate the objectives of SEQRA.

> Admittedly, an environmental impact statement need not identify and address every conceivable environmental impact, mitigating measures or alternative to satisfy SEQRA (*Matter of Jackson v. New York State Urban Dev. Corp.*, supra. at 417; *Aldrich v. Pattison*, 107 AD2d 258, 266), but here the Legislature has taken pains to express heightened environmental concern for the Karner Blue butterfly, whose continued existence depends upon the preservation of its singular habitat, by according it endangered species status. If the Legislature's concern is to be respected, as it must be, *then the question of minimum acreage needed to ensure the survival of the endangered species and its habitat is to be resolved.* In the light of this, the Board's authorization of maximum development of the land involved, without offering any empirical data or other satisfactory documentation to resolve the minimum acreage issue, was an arbitrary and capricious act." (130 NY AD2d, at 3-4) [Emphasis Added]

In short, the Court, not the municipal body, effectively conditioned subdivision approval upon resolution of the ecological issue of establishing a minimum preserve area. The record demonstrates that ecology is still an inexact science and the minimum preserve issue may never be resolvable. Thus, imposition of the stated condition may permanently preclude Petitioner from use of its land, creating a *de facto* preserve area without the State having to pay just compensation, a neat trick but abhorrent to the Constitution. Given that requiring Petitioners convey without compensation their land to the municipality to establish just such a preserve would violate the Fifth and Fourteenth Amendments, the question presented is simply whether requiring resolution of the minimum preserve issue as a condition of subdivision approval effects the same constitutional violation.

As a factual matter, it is significant that this Court recognize that the so-called minimum preserve issue was identified and assessed at length throughout the SEQRA review process, albeit not resolved (see Planning Board Findings of Fact dated August 12, 1986 set forth in Appendix D, pp. 56). Project opponents

proffered their purported expert's affidavits to support their claim that a minimum of 2,000 acres was needed; notably, the City of Albany planner recognized that the same so-called expert had previously given various estimates ranging from 40 acres to 3,000 acres and thus discredited the claimed need for 2,000 acres. (R 73, 89, 154, 255, 269) In a responsible effort to address the issue, the City of Albany retained one Dr. Thomas J. Givnish, a noted environmental expert from the University of Wisconsin. Dr. Givnish opined that the theory that increased habitat area will necessarily support a greater number of species, underlying the minimum preserve issue, was inapplicable to the site, due to the fact that the site is surrounded by existing development; Dr. Givnish further opined, however, that a range of 1,500 to 2,000 preserve acres would be appropriate, assuming the validity of the data proffered by the project objectors (Final GEIS Appendix F - Report of Dr. Givnish). Dr. Givnish noted that ecology is still an inexact science for which there are no set answers nor proof which could be utilized to ever resolve the minimum preserve issue (FGEIS, Appendix F, p. 3, Item 3). SEQRA does not require scientific unaminity, nor does it contemplate exact scientific results (see *Aldrich v. Pattison*, 107 NY2d 258 at 276; see also, *Save the Niobrara River Association, Inc. v. Andrus*, 483 F Supp 844, at 869). Although the minimum preserve issue was never resolved, the Planning Board did approve KMRS in accordance with a plan proffered by the Nature Conservancy, providing for the ultimate preservation of 1,700 acres throughout the Pine Bush proper (see Planning Board Findings of Fact, Appendix D, pp. 56, 61).

It is well settled that "land use regulation does not effect a taking if it substantially advances[s] legitimate state interests and does not den[y] an owner economically viable use of his land" (*Nollan v. California Coastal Comm'n*, 97 L Ed. 2d 677, at 687, citing *Agins v. Tiburon*, 447 US 255, at 260, 65 L Ed. 2d 106). In *First Lutheran Church v. Los Angeles County*, 96 L Ed. 2d 250, at 264-265, this Court noted,

> "It has also been established doctrine at least since Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 US 393, 67 L Ed. 2d 322, 435 CT 158, 28 ALR 1321 (1922) that '[t]he general rule at

> least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking'."

Once a regulatory taking occurs, the appropriate remedy under the Fifth Amendment is to pay just compensation from the date of the taking to the date that the challenged regulation is finally declared unconstitutional (*First Lutheran Church v. Los Angeles County*, 96 L Ed 2d 250, at 268). In *Williamson Planning Comm'n v. Hamilton Bank*, 87 L Ed 2d 126, at 145, the Court identified the appropriate remedy where a government regulation violates the due process clause, stating,

> "The remedy for a regulation that goes too far, under the due process theory, is not 'just compenation', but invalidation of the regulation, and if authorized and appropriate actual damages".

Imposing the condition to resolve the minimum preserve issue solely upon Petitioner for the public benefit also brings to the forefront a violation of the Equal Protection Clause of the Fourteenth Amendment which bars the State from singling out the Petitioner to bear the public burden of establishing a minimum preserve for the Pine Bush proper (see *Nollan v. California Coastal Comm'n*, 97 L Ed. 2d 677, 688, fn. 4).

The principle that the state has a right to regulate land use so long as it does not go too far is easily stated, yet ever elusive to determine. In *Nollan v. California Coastal Comm'n*, 97 L Ed. 2d 677, at 687-692, this Court specifically addressed the appropriate method "for determining what constitutes a legitimate state interest or what type of connection between the regulation and the state interest satisfies the requirement that the former substantially advance the latter" under facts and circumstances analogous to the facts at hand, meriting careful review.

In *Nollan v. California Coastal Comm'n*, 67 L Ed. 2d 677, the Commission had conditioned its issuance of a building permit to Nollan to rebuild his beachfront home, on Nollan's grant of an easement to the public to walk across his beachfront. *Nollan* challenged same as a regulatory taking, violative of the Fifth Amendment, as incorporated against the States by the Fourteenth

Amendment. This Court agreed, and found that the condition imposed upon the permit constituted an impermissable regulatory taking. In so doing, the Court cited examples of appropriate permit conditions, "for example, a height limitation, a width restriction or a ban on fences", as valid exercises of the police power to foster the state interest in the public's ability to see the beach. In finding that the condition imposing an easement went too far, however, this Court reasoned,

> "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. *Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion'.*"
> (*67* L Ed. 2d, at 689) [Emphasis Added]

This Court further stated,

> "As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a 'substantial advanc[ing]' of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is *heightened risk* that the purpose is avoidance of the compensation requirement, rather than the stated police power objective."
> (67 L Ed. 2d, at 692) [Emphasis Added]

This Court's stated rationale in *Nollan*, and the "heightened risk" warned of therein, necessitate a finding that the condition imposed upon Petitioner's subdivision, like the condition imposed on Nollan's building permit, also be found unconstitutional.

Petitioner submits that conditioning its subdivision upon resolution of the minimum preserve issue for the Pine Bush proper, does not have a sufficient nexus to the purpose of conducting a SEQRA review in the first instance. SEQRA requires only that relevant areas of environmental concern be identified, looked at hard, and, balancing the social, economic and environmental factors present, that adverse environmental impacts be minimized to the fullest extent practicable. Nowhere in SEQRA does there exist a duty to resolve ecological issues identified and assessed.

Petitioner readily concedes that appropriate conditions may be imposed upon its subdivision to satisfy SEQRA requirements. Like the height and width restrictions identified by this Court as appropriate in *Nollan*, supra., Petitioner's subdivision was properly conditioned upon the set-aside of a 37.7 acre on site preserve, the location and configuration of such area being designed to contribute to an overall preserve area for the Pine Bush proper. Requiring an on-site preserve as a condition of subdivision approval had a sufficient nexus to the SEQRA purpose that adverse environmental impacts be mitigated to the fullest extent practicable, but did not deprive Petitioner of any economically viable use of its land.

In stark contrast to the Planning Board's requirement that a 37.7 acre preserve be set aside, the Appellate Division's self-imposed condition requiring resolution of the minimum preserve issue, fails to further the purpose of SEQRA for it ignores the economic and social factors present, isolating its view to environmental factors only, contrary to the SEQRA balancing philosophy expressly set forth in ECL §8-0109(a). In addition, the condition imposed by the Appellate Division, unlike that imposed by the Planning Board, destroys any economically viable use of the property.

Petitioner respectfully submits that while the Appellate Division claims that SEQRA requires that the minimum preserve issue be resolved, the risk that the impact of the Court's decision to relegate Petitioner's lands to a preserve, "in avoidance of the compensation requirement rather than the stated police power objective", is too real and must not be permitted. This impact effectuates a regulatory taking and the Constitution commands that the State Court's decision be reversed.

FEDERAL QUESTIONS RAISED IN STATE COURT

Initially, the proceeding before the State Court did not necessarily involve questions of constitutional dimension but rather involved the question of whether the subdivision approval was made in accordance with the provisions of SEQRA. As set forth above, the constitutional violation occurred when the Appellate Division of the Supreme Court held that the Petitioners were required to *resolve* the minimum preserve issue as a pre-condition to subdivision approval, which Petitioner submits effectuated a regulatory taking. The question of whether a SEQRA duty exists to resolve ecological issues, however, was first raised in the pleadings, from which duty the constitutional violations arises.

In the First Affirmative Defense set forth in its Answer, Petitioner pled,

> "105. SEQRA does not require that every conceivable environmental impact, mitigating measure, or alternative be identified and addressed, nor does SEQRA require that an agency reach a particular result on any issue, including but not limited to the issue of deter-

> mining the numerical minimum acres necessary to maintain the Pine Bush ecosystem and the Karner Blue Butterfly habitat." (R 343)

In vacating the subdivision as violative of SEQRA, the Court at Special Term held only that the minimum preserve issue was not properly addressed and did not specifically address any federal questions (see Appendix A, pp. 31 - 32).

Petitioner timely perfected its appeal to the Appellate Division of the Supreme Court. In its Brief and on oral argument, Petitioner argued that the invalidation of the subdivision solely on environmental grounds, without consideration of the economic and social impacts, deprived Petitioner of any economically viable use of its property in violation of the Fourteenth Amendment to the United States Constitution. It must be remembered, at that stage of the State Court action, neither the Planning Board nor the Court at Special Term of the Supreme Court, had imposed a duty to resolve ecological issues as a condition of subdivision approval. In its decision, the Appellate Division of the Supreme Court did not address any federal questions, yet imposed for the first time the purported SEQRA duty to resolve ecological issues as a condition to subdivision approval (see Appendix A, pp. 27 - 28).

In its Motion for Leave to Appeal to the Court of Appeals dated August 20, 1987, Petitioner argued that the imposition of the duty to resolve the minimum preserve issue as a condition to subdivision approval violated the due process and just compensation clauses of the Fifth and Fourteenth Amendment to the United States Constitution. Petitioner includes the following excerpt from its Brief in support of the stated motion, to wit:

> "The use of SEQRA to require a property owner resolve an unresolvable significant environmental issue may be likened to a zoning regulation which proscribes the property owner from any reasonable use of the property, a regulatory taking in violation of the just compensation clause of the Fifth Amendment of the United States Constitution, as well as a violation of the liberty and due process clause of the Fourteenth Amendment of the United States Constitution and

> Article 1 Section 6 of the New York State Constitution, by reason of the fact that imposition of such a governmental regulation goes so far that it has the same effect as a taking by eminent domain and is an invalid exercise of the police power (see *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California*, _____ U.S. _____ 1[June 9, 1987]; see also *Williamson Planning Comm'n v. Hamilton Bank*, 473 US _____, 87 L Ed 2d 126, at 145). In short, the real impact of the Appellate Division's requirement that the minimum preserve issue be resolved is that BPS will be prevented from any use of its property, a clear unequivocal unconstitutional result."

(Excerpt from Petitioner's Brief, pp. 28-29, in support of its Motion for Leave to Appeal to the New York State Court of Appeals dated August 20, 1987). The Court of Appeals denied the Motion for Leave to Appeal by decision dated October 22, 1987 and did not address the federal question (Appendix A, page 24).

Petitioner timely filed its Motion for Reargument of its Motion for Leave to Appeal dated November 13, 1987. In its Brief in support of the reargument, Petitioner again raised the constitutional arguments, in part, as follows, to wit:

> "The crux of the constitutional issue presented on this appeal is whether or not the use of SEQRA to require a property owner to resolve an environmental issue, otherwise identified and assessed through the use of environmental impact statements, crosses over the fine line which exists between a regulatory as opposed to a prohibitory restriction, without compensation, in violation of the "just compensation" and the "liberty and due process clauses of the Constitution. Appellant submits that requiring resolution of ecological issues which do not lend themselves to resolution goes too far, effectively deprives the property owner of any use of its property, and constitutes a clear and unequivocal unconstitutional result. While Appellant readily acknowledges the importance of SEQRA

> compliance, such compliance must not be conditioned on the loss of liberty. The Constitution imposes a duty upon this Court to reconsider its prior determination not to hear this appeal, for the failure to address the issue will deprive not only the Appellants of their liberty but will expose all other property owners seeking to develop their property in compliance with SEQRA to future liberty violations."

(Excerpt from Petitioner's Brief in Support of its Motion to Reargue Motion for Leave to Appeal to New York Court of Appeals dated November 13, 1987, pp. 34-35). The Court of Appeals denied the Reargument Motion by Decision dated December 23, 1987 and did not address any federal questions (Appendix A, page 24).

Inasmuch as the federal question presented arises out of the imposition of a SEQRA duty, which duty Petitioner specifically objected to in the pleadings, and thereafter raised constitutional objections in its Brief before the Appellate Division of the Supreme Court, and in its Briefs in Support of the Motion for Leave to Appeal to the Court of Appeals and the Reargument Motion for Leave to Appeal to the Court of Appeals, Petitioner respectfully submits that the federal questions have been preserved for this Court's review on writ of certiorari in accordance with 28 USC §1257(3).

REASONS FOR GRANTING THE WRIT

The posture of this case compels the attention of this Court for it brings to the forefront a real and final controversy arising out of government action against specific property, important not only because Petitioner is deprived of any economically viable use of its property, but also because it serves as dangerous precedent for future regulatory takings of property under the guise of imposing environmental compliance with the provisions of SEQRA, in avoidance of the compensation requirement (see *Keystone Coal Association v. DeBenedictis*, 480 US _____, 94 L Ed. 472, at 494, 198 5 Ct _____).

In two recent cases, this Court refused to rule on the question of whether rejection of a residential subdivision deprived the

property owner of his property without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution on the grounds that the issues presented were not ripe. In *Williamson Planning Commission v. Hamilton Bank*, 473 US _____, 87 L Ed. 2d 126, 105 S Ct _____ and in *McDonald, Sommer and Frates v. Yolo County, et al.*, 477 US _____, 91 L Ed. 285, 106 S Ct. _____, this Court held that the regulatory taking claims were not *ripe* because each subdivision had been rejected on the grounds of noncompliance with the relevant provisions of the zoning ordinance, for which a variance remedy was available but not utilized by the property owner or, alternatively, that each property owner had an adequate state procedure available consisting of an inverse condemnation action against the municipal body which had rejected the subdivision. The instant case is distinguished for there exists no variance procedure from the provisions of SEQRA, nor is an inverse condemnation procedure available, inasmuch as the Appellate Division of the Supreme Court, not the Planning Board, had rejected the subdivision. In short, absent this Court's review, the Petitioner's ability to use their land is finally precluded by the Appellate Division's decision.

With respect to the issue of finality, Petitioner further points out that all of the availabe procedures set forth in SEQRA have been utilized. Specifically, once a positive declaration of environmental impact has been made, SEQRA requires the preparation of site-specific Draft and Final Environmental Impact Statements (ECL §8-0109). In addition, where multiple projects are pending in a defined geographic area, the environmental lead agency may utilize a Generic EIS to assess the cumulative impacts. Herein, both Draft and Final site specific EIS's and a Draft and Final Generic EIS were utilized. While SEQRA does not provide a procedure for the preparation of a Supplemental EIS, there is judicial authority therefore "if environmentally significant modifications are made after the issuance of a FEIS" (*Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, at 429-430). Herein, no modifications were made to the subdivision plans after the FEIS was approved and accordingly, no further SEQRA procedures were available. The present controversy is ripe for review.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the Order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, dated and entered August 10, 1987. In the event that the Petition is granted, Petitioner prays that the Order of the State Court below be reversed, that the cause be remanded, and that the Court below be directed to proceed in accordance with this Court's determination.

RESPECTFULLY
SUBMITTED BY:
RUTNIK & RUTNIK, ESQS.

By: _____
Douglas Paul Rutnik

DATE: March 9, 1988

RUTNIK & RUTNIK, ESQS.
Douglas Paul Rutnik, Counsel of Record
for Petitioner Benacquista, Polsinelli
and Serafini Management Corp.
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APPENDIX A

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Mo. No. 1339

In the Matter of Save the Pine Bush, Inc., et al.,

Respondents,

vs.

Planning Board of the City of Albany,

Respondents,

Benacquista, Polsinelli and Serafini Management Corporation,

Appellant.

Motion for reargument of motion for leave to appeal denied.

DECISION COURT OF APPEALS DEC 23 1987

3-10 Mo. No. 1063

In the Matter of Save the Pine Bush, Inc., et. al.,

Respondent,

vs.

Planning Board of the City of Albany, et al.,

Respondents,

and Benacquista, Polsinelli and Serafini Management Corporation,

Appellant.

Motion by Benacquista, Polsinelli and Serafini Management Corporation for leave to appeal denied.

DECISION COURT OF APPEALS OCT 22 1987

Supreme Court — Appellate Division
Third Judicial Department

July 30, 1987 53980

In the Matter of SAVE THE PINE BUSH, INC., et al.,

Respondents,

v

PLANNING BOARD OF THE CITY OF ALBANY et al.,

Appellants,

OPINION

BENACQUISTA, POLSINELLI AND SERAFINI MANAGEMENT CORPORATION,

Intervenor-Appellant.

Argued, May 12, 1987.

Before:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. JOHN T. CASEY,
HON. PAUL J. YESAWICH, JR.,
HON. HOWARD A. LEVINE,
HON. NORMAN L. HARVEY,
Associate Justices.

APPEAL from that part of an order and judgment of the Supreme Court (EDWARD S. CONWAY, J.), entered December 9, 1986 in Albany County, which granted petitioners' application, in a combined action and proceeding pursuant to CPLR article 78, to annul a determination of respondent Planning Board of the City of Albany approving intervenor's residential site development plan.

VINCENT J. MC ARDLE, JR., (John C. Egan, Jr., of counsel), City Hall, Albany, New York 12207, for appellants.

OLIVER & OLIVER (Lewis B. Oliver, Jr., of counsel), 156 Madison Avenue, Albany, New York 12202, for respondents.

RUTNIK & RUTNIK (Peter A. Lynch of counsel), 112 State Street, Suite 1320, Albany, New York 12207, for intervenor-appellant.

YESAWICH, JR., J.

This appeal is another growing out of proposed commercial and residential development of the Pine Bush area located within respondent City of Albany *(see, Matter of Save the Pine Bush* v *City of Albany*, 117 AD2d 267, mod _____ NY2d _____ [June 11, 1987]; *Matter of Save the Pine Bush* v *Planning Bd. of City of Albany*, 96 AD2d 986, *lv denied* 61 NY2d 668). The Pine Bush, a unique inland sand dune and habitat of rare plants and animal species such as the endangered Karner Blue butterfly, is recognized as having "a number of distinct environmental characteristics worthy of protecting" *(Matter of Save the Pine Bush* v *City of Albany*, _____ NY2d _____ [June 11, 1987] slip opn p 2).

In the early 1960s intervenor, Benacquista, Polsinelli and Serafini Management Corporation (BPS), purchased 250 acres of land in the Pine Bush and in 1978 presented a conceptual plan for its development in three phases. The first phase called for residential development of 121 acres referred to as the Karner Meadows Residential Subdivision (KMRS). Phases two and three envisioned developing the remaining acreage for commercial and multifamily purposes. This plan, through initially approved by respondent Planning Board of the City of Albany (Board), was subsequently found not to have been in compliance with the State Environmental Quality Review Act regulations (ECL art 8 [SEQRA]) and was annulled *(Matter of Save the Pine Bush* v *Planning Bd. of City of Albany*, 96 AD2d 986, *supra*).

In August 1984, BPS submitted a new proposal for approval of only the 121-acre KMRS development. After several draft environmental impact statements were prepared and public

comment was had thereon, a final generic environmental impact statement (FGEIS) was submitted to the Board in June 1986. The Board granted BPS conditional approval for the KMRS development in August 1986, after which petitioners instituted this suit seeking review of the Board's determination. Supreme Court annulled the Board's decision, prompting this appeal by respondents and BPS. We affirm.

The standard of judicial review of a SEQRA determination is whether the reviewing agency identified the relevant areas of environmental concern, took a "hard look" at them (*H.O.M.E.S.* v *New York State Urban Dev. Corp.*, 69 AD2d 222, 232), and made a reasoned elaboration of the basis for its determination (*see, Chinese Staff & Workers Assn.* v *City of New York*, 68 NY2d 359, 363-365; *Matter of Jackson* v *New York State Urban Dev. Corp.*, 67 NY2d 400, 417). Though easily articulated, this standard is often difficult to apply.

Here, Supreme Court concluded that a "hard look" cannot be said to have occurred without "consider[ing] the question of what is the minimum acreage that the Pine Bush ecology needs to survive" or "the number of acres that is a minimum habitat in order for the Karner Blue butterfly to survive". We agree.

While respondents and BPS suggest that resolution of this issue is "outside the scope of a generic EIS [environmental impact statement]", we deem it precisely the kind of environmental issue that needs to be evaluated when, as here, the habitat of an endangered species is at risk) 6 NYCRR 182.6[a] [2]) and the municipality has opted for maximum development of the land area involved without proposing any substantively salutary mitigating measures which would minimize the adverse environmental effect of its decision; to allow the Board to do otherwise would frustrate the objectives of SEQRA.

Admittedly, an environmental impact statement need not identify and address every conceivable environmental impact, mitigating measure or alternative to satisfy SEQRA (*Matter of Jackson* v *New York State Urban Dev. Corp., supra*, p 417; *Aldrich* v *Pattison*, 107 AD2d 258, 266), but here the Legislature has taken pains to express heightened environmental concern for the Karner Blue butterfly, whose continued existence depends upon the preservation of its singular habitat, by according it endangered species status. If the Legislature's concern is to be

respected, as it must be, then the question of minimum acreage needed to ensure the survival of the endangered species and its habitat is to be resolved. In the light of this, the Board's authorization of maximum development of the land involved, without offering any empirical data or other satisfactory documentation to resolve the minimum acreage issue, was an arbitrary and capricious act.

Additionally, we have considerable doubt as to the quantitative validity of an underlying assumption upon which the entire FGEIS is based. Throughout its entire environmental analysis, the Board observed that a minimum of approximately 1,700 acres of preserve lands were to be set aside for the habitat. However, of this land, only 421 acres then existed within the municipality's borders. Even assuming that the proposed purchase of an additional 160 acres by the City will be consummated, the lion's share of the proposed 1,700 acres remains 616 acres of land which are presumably to be purchased in the Town of Colonie, Albany County, another municipality. Thus, the Board's approval of BPS' plan presupposed land purchases which the record does not disclose have indeed been consummated. The reality appears to be that the Board's approval was given on substantially less than a 1,700-acre preserve.

Additionally, we are in agreement with Supreme Court's conclusion that the Board's decision not to require a bond for the full amount of the projected costs of improvements and instead to allow for bonding in stages over the four-phase 10-year period that the KMRS development will be under construction violated General City Law § 33. General City Law § 33, *inter alia*, permits the Board to adjust the value of a performance bond "at any time *during the term of the performance bond*" (emphasis supplied). This language contemplates adjustments in the bond once performance is underway. An "anticipatory adjustment" is not countenanced by the statute (*see, Matter of Friends of Pine Bush* v *Planning Bd of the City of Albany*, 86 AD2d 246, 249, *affd on opn below* 59 NY2d 849). As a condition of the approval of an entire subdivision, the owner must install the improvements or furnish a bond for improvement costs occasioned by the development of the entire site before commencing construction (*see, id.*).

Opinion by YESAWICH, JR., J., in which MAHONEY, P.J., CASEY, LEVINE and HARVEY, JJ., concur.

Order and judgment affirmed, without costs.

DECISION

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

SAVE THE PINE BUSH, INC.; REZSIN ADAMS, President; JOHN WOLCOTT, GREGORY BELL, MARK PLAAT, LYNNE JACKSON and GENE DAMM, as Officers and Individuals and Taxpayers,
Plaintiff-Petitioners,

-against-

THE PLANNING BOARD and THE CITY OF ALBANY,
Defendant-Respondents.

Supreme Court, Albany County Special Term, October 17, 1986
Justice Edward S. Conway, presiding
(Calendar #ST0386)

APPEARANCES:
OLIVER & OLIVER, Esqs.
Attorneys for Plaintiff-Petitioners
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VINCENT J. McARDLE, JR., Esq.
Corporation Counsel, City of Albany
Attorney for Defendant-Respondents
John C. Egan, Jr., of Counsel

Department of Law
City Hall
Albany, New York 12207

RUTNIK & RUTNIK, Esqs.
Attorneys for Proposed Intervenor-Respondent
Peter A. Lynch, Esq., of Counsel
112 State Street, Suite 1320
Albany, New York 12207

CONWAY, J:

This is an Article 78 proceeding in which petitioners seek an order declaring that the approval of the Karner Meadows plat by the Planning Board of the City of Albany on August 12, 1986 is null and void, and also for an order permanently enjoining any land clearing, construction, or any other action as to the Karner Meadows Subdivision plat until the State Environmental Quality Review Act (hereinafter referred to as SEQRA), the State Endangered Species Act, and General City Law 33 have been complied with.

Benacquista, Polsinelli and Serafini Management Corp. (hereinafter referred to as BPS), proposed intervenor-respondent, opposes the motion and moves for an order granting it permission to intervene in the within proceeding on the ground that the petitioners seek to vacate the Planning Board's approval of the Karner Meadows Residential Subdivision, which is owned and developed by BPS, and that a judgment therefore will necessarily affect BPS's property interests. The motion of BPS to intervene is granted.

Petitioners, a not-for-profit corporation whose sole purpose is to promote the preservation of Albany's pine barrens, or pine bush, object to the approval of the Karner Meadows Residential Subdivision (hereinafter referred to as KMRS) by the City of Albany Planning Board on August 12, 1986. The KMRS consists of 234 building lots on a 121 acre parcel. It is one part of a larger area of the Pine Bush located south of Washington Avenue Extension and east of Route 155 and which is owned by BPS.

On August 28, 1984, BPS submitted an application to the City of Albany Planning Board. As part of its application, BPS

submitted a Draft Environmental Impact Statement (DEIS). On September 18, 1984, the City of Albany Planning Board passed a resolution designating itself as "Lead Agency" for the purpose of conducting a SEQRA review of the project. On October 9, 1984, the Planning Board approved the DEIS as to scope, form and content, and on November 15, 1984, the Planning Board conducted a public hearing to obtain comments on the DEIS. The final EIS was approved by the Planning Board on June 18, 1985 and accepted as complete.

During August of 1985, BPS submitted final plans for the subdivision, requesting approval at that time. The Planning Board however decided to withhold final action on KMRS as part of the moratorium on development (which the City of Albany had declared in July of 1985 until a Generic Environmental Impact Statement was prepared by Malcolm Pirnie Associates). From February of 1986 through June of 1986, the Planning Board as Lead Agency, with the approval of the New York State Department of Environmental Conservation, completed and approved a Draft Generic Environmental Impact Statement (DGEIS) and a Final Generic Environmental Impact Statement (FGEIS).

On August 12, 1986, the Planning Board adopted a SEQRA Finding Statement and voted to approve the KMRS.

The petitioners contend that the Planning Board's decision is arbitrary and capricious and should be declared null and void because it did not take a hard look at the significant environmental impacts in that it failed to assess the cumulative environmental impacts of development proposals on the Pine Bush and it failed to consider the question of what is the minimum acreage that the Pine Bush ecology needs to survive. Further, petitioners contend that General City Law 33 requires that the owner shall install improvements or post a performance bond sufficient to cover the full cost of improvements prior to approval of a subdivision by the Planning Board and no performance bond for the full cost of the improvements was posted prior to the approval herein and, therefore, the approval by the Planning Board is null and void.

This Court must agree with the contentions of the petitioners. When the findings of the Planning Board fail to assess the

cumulative environmental aspects of the development proposals on the Pine Bush, and when the effect of this proposal on the question of minimum acreage that the Pine Bush ecology needs to survive, or the number of acres that is a minimum habitat in order for the Karner Blue butterfly to survive is not considered, the decision is anullity.

The Karner Blue butterfly is an endangered species and the question of the minimum preserve size for such an endangered species is an important environmental impact which must be considered in a cumulative impact statement and which was not considered herein. By failing to address the issue of the minimum Pine Bush preserve necessary for the survival of the Karner Blue butterfly, and the unique Pine Bush ecology, the FGEIS and the FEIS failed to consider an important environmental impact and failed to take a hard look at the environmental impact which is a requirement of the Rules (6 NYCRR 617.14(f)(3)) and the previous decisions of this Court and of the Appellate Division.

Further, the procedure by the Planning Board in not requiring a performance bond by BPS before the approval, was a violation of Section 33 of the General City Law and renders the decision a nullity (see *Matter of Friends of the Pine Bush, et al.* v *Planning Board of the City of Albany, et al.*, 86 AD2d 246).

The petition is in all respects granted.

Petitioners to submit order.

All papers to the Attorneys for Petitioners for filing upon entry of the order hereon. Decision mailed 11/19/86.

APPENDIX B

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State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of December A.D. 1987

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 1339

In the Matter of Save the Pine Bush, Inc., et al.,

Respondents,

vs

COPY

Planning Board of the City of Albany,

Respondent,

Benacquista, Polsinelli and Serafini Management Corporation,

Appellant.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/S/Donald M. Sheraw,
Clerk of the Court

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of October A.D. 1987

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

3-10 Mo. No. 1063

In the Matter of Save the Pine Bush, Inc., et al.,

Respondents,

vs

COPY

Planning Board of the City of Albany, et al.,

Respondents,

and Benacquista, Polsinelli and Serafini Management Corporation,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant Benacquista, Polsinelli and Serafini Management Corporation herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/S/Donald M. Sheraw,
Clerk of the Court

At a Term of the Appellate Division of the Supreme Court

of the State of New York, held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York, commencing on the 11th day of May, 1987.

PRESENT: HON. FRANKLIN MAHONEY,
Presiding Justice,
HON. JOHN T. CASEY,
HON. PAUL J YESAWICH, JR.,
HON. HOWARD A. LEVINE,
HON. NORMAN L. HARVEY,
Associate Justices

In the Matter of SAVE THE PINE BUSH, INC., ET AL.,

Respondents,

ORDER
Albany County
Index No. 9566-86

v

THE PLANNING BOARD and THE CITY OF ALBANY,

Appellants,

and

BENACQUISTA, POLSINELLI AND SERAFINA MANAGEMENT CORPORATION,

Intervenor-Appellant.

This proceeding, for a declaratory judgment and pursuant to CPLR Article 78 to annul a determination of respondent Planning Board of the City of Albany approving intervenor's residential site development plan, having appealed from that part of an order and Judgment of the Supreme Court of Albany County,

entered on the 9th day of December, 1986, in the office of the Clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Vincent J. McArdle, Jr., John C. Egan, Jr., Esq., of counsel for appellants, by Rutnik and Rutnik, Peter A. Lynch, Esq., of counsel for intervenor-appellant, and by Oliver and Oliver, Lewis B. Oliver, Jr. Esq., of counsel for respondents, and after due deliberation, the Court having rendered a decision on the 30th day of July, 1987, it is hereby

ORDERED that the Order and Judgment so appealed from be and hereby is affirmed, without costs.

ENTER:

/s/ Michael J. Novack
Clerk

DATED AND ENTERED: August 10, 1987.

A TRUE COPY

/s/ Michael J. Novack

CLERK

ORDER AND JUDGMENT

At a Term of the Supreme Court
held in and for Albany County
on October 17, 1986

PRESENT: HON. EDWARD S. CONWAY

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ALBANY**

In the Matter of the Application of
SAVE THE PINE BUSH, INC.; REZSIN ADAMS, JOHN WOLCOTT, GREGORY BELL, MARK PLAAT, LYNNE JACKSON, and GENE DAMM, as Officers and Individuals and Taxpayers,

Plaintiff-Petitioners,

ORDER AND JUDGMENT

Index No. 9566-86

Defendant-Respondents,

-against-

THE PLANNING BOARD and THE CITY OF ALBANY,

and

BENACQUISTA, POLSINELLI AND SERAFINI MANAGEMENT CORP.,

Intervenor-Respondents.

The Plaintiff-Petitioners having commenced this action/proceeding by means of a Notice of Petition, Summons and Verified Complaint/Petition each dated September 11, 1986, together with the Affidavit of John F. Cryan sworn to September 8, 1986 and the Affidavit of Margaret Stewart sworn to September 9, 1986 in support thereof, and the Defendant-Respondent, Planning Board of the City of Albany, having submitted its Answer verified by John C. Egan, Jr., Esq., Assistant Corporation Counsel on October 14, 1986, the Affidavit of Willard T. Bruce, sworn to the 16th day of October, 1986 and the Return on Appeal (a copy of which is attached hereto and made a part hereof), in opposition to the Complaint/Petition, and Intervenor-Respondent, Benacquista, Polsinelli and Serafini Management Corp. (BPS), having moved to intervene in the within action/proceeding by Notice of Motion dated October 8, 1986 together with the Affidavit of Luigi Serafini dated October 8, 1986 and the Affirmation of Peter A. Lynch, Esq., affirmed the 8th day of October, 1986 in support of the Motion to Intervene and in opposition to the relief requested in the Complaint/Petition, and the Plaintiff-Petitioners having submitted the Supplementary Affidavit of Lewis B. Oliver, Jr., Esq., sworn to the 12th day of November,

1986 in further support of the Complaint/Petition, and the above term, and the Plaintiff-Petitioners having appeared by their attorney Lewis B. Oliver, Jr., Esq., the Defendant-Respondents. City of Albany and Planning Board having appeared by their counsel, Madeline D. Maney, Assistant Corporation Counsel, and Intervenor-Respondents BPS having appeared by their counsel, Rutnik & Rutnik, Esqs., (Peter A. Lynch, of counsel), and each of the said counsel having argued their cause before this Court, and this Court having duly read and considered all of the foregoing pleadings and exhibits contained in the record, and having issued a written decision on the 19th day of November, 1986 granting the foregoing motion to intervene and granting the relief requested in the Petition,

NOW, upon the motion of Rutnik & Rutnik, Esqs., (Peter A. Lynch, of counsel), it be and hereby is

ORDERED, that the motion of BPS Management Corp. to intervene in this action/proceeding is granted, and it is further

ORDERED, ADJUDGED and DECREED that the Petition is granted and the August 12, 1986 City of Albany Planning Board approval of the Karner Meadows Residential Subdivision Plat be and hereby is vacated and deemed null and void as violative of SEQRA, and of Section 33 of the General City Law and the Counterclaim contained in BPS's Answer is dismissed.

Signed this 5th day of December, 1986 at Albany, New York.

/S/ Edward S. Conway

APPENDIX C

Page

NEW YORK ENVIRONMENTAL CONSERVATION LAW ARTICLE:

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ARTICLE 8—ENVIRONMENTAL QUALITY REVIEW

Section

8-0101. Purpose.
8-0103. Legislative findings and declaration.
8-0105. Definitions.
8-0107. Agency implementation.
8-0109. Preparation of environmental impact statement.
8-0111. Coordination of reporting; limitations; lead agency.
8-0113. Rules and regulations.
8-0115. Severability.
8-0117. Phased implementation.

§ 8-0101. Purpose

It is the purpose of this act to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.

§ 8-0103. Legislative findings and declaration

The legislature finds and declares that:

1. The maintenance of a quality environment for the people of this state that at all times is healthful and pleasing to the senses and intellect of man now and in the future is a matter of statewide concern.

2. Every citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment.

3. There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state.

4. Enhancement of human and community resources depends on a quality physical environment.

5. The capacity of the environment is limited, and it is the intent of the legislature that the government of the state take immediate steps to identify any critical thresholds for the health

and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds from being reached.

6. It is the intent of the legislature that to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in this article. However, the provisions of this article do not change the jurisdiction between or among state agencies and public corporations.

7. It is the intent of the legislature that the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy. Social, economic, and environmental factors shall be considered together in reaching decisions on proposed activities.

8. It is the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

9. It is the intent of the legislature that all agencies which regulate activities of individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage.

§ 8-0105. Definitions

Unless the context otherwise requires, the definitions in this section shall govern the construction of the following terms as used in this article:

1. "State agency" means any state department, agency, board, public benefit corporation, public authority or commission.

2. "Local agency" means any local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state.

3. "Agency" means any state or local agency.

4. "Actions" include:

(i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance

from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;

(ii) policy, regulations, and procedure-making.

5. "Actions" do not include:

(i) enforcement proceedings or the exercise of prosecutorial discretion in determining whether or not to institute such proceedings;

(ii) official acts of a ministerial nature, involving no exercise of discretion;

(iii) maintenance or repair involving no substantial changes in existing structure or facility.

6. "Environment" means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.

7. "Environmental impact statement" means a detailed statement setting forth the matters specified in section 8-0109 of this article. It includes any comments on a draft environmental statement which are received pursuant to section 8-0109 of this article, and the agency's response to such comments, to the extent that such comments raise issues not adequately resolved in the draft environmental statement.

8. "Draft environmental impact statement" means a preliminary statement prepared pursuant to section 8-0109 of this article.

§ 8-0107. Agency implementation

All agencies shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this article, and shall recommend or effect such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this article. They shall carry out its terms with minimum procedural and administrative delay, shall avoid unnecessary duplication of reporting and review requirements by providing, where feasible, for combined or consolidated

proceedings, and shall expedite all proceedings hereunder in the interests of prompt review.

§ 8-0109. Preparation of environmental impact statement

1. Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

2. All agencies (or applicant as hereinafter provided) shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment. Such a statement shall include a detailed statement setting forth the following:

(a) a description of the proposed action and its environmental setting;

(b) the environmental impact of the proposed action including short-term and long-term effects;

(c) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(d) alternatives to the proposed action;

(e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(f) mitigation measures proposed to minimize the environmental impact;

(g) the growth-inducing aspects of the proposed action, where applicable and significant;

(h) effects of the proposed action on the use and conservation of energy resources, where applicable and significant; and

(i) such other information consistent with the purposes of this article as may be prescribed in guidelines issued by the commissioner pursuant to section 8-0113 of this chapter.

Such a statement shall also include copies or a summary of the substantive comments received by the agency pursuant to subdivision four of this section, and the agency response to such comments. The purpose of an environmental impact statement

is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action. Such statement should be clearly written in a concise manner capable of being read and understood by the public, should deal with the specific significant environmental impacts which can be reasonably anticipated and should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts.

3. An agency may require an applicant to submit an environmental report to assist the agency in carrying out its responsibilities, including the initial determination and, (where the applicant does not prepare the environmental impact statement), the preparation of an environmental impact statement under this article. The agency may request such other information from an applicant necessary for the review of environmental impacts. Notwithstanding any use of outside resources or work, agencies shall make their own independent judgment of the scope, contents and adequacy of an environmental impact statement.

4. As early as possible in the formulation of a proposal for an action, the responsible agency shall make an initial determination whether an environmental impact statement need be prepared for the action. When an action is to be carried out or approved by two or more agencies, such determination shall be made as early as possible after the designation of the lead agency.

With respect to actions involving the issuance to an applicant of a permit or other entitlement, the agency shall notify the applicant in writing of its initial determination specifying therein the basis for such determination. Notice of the initial determination along with appropriate supporting findings on agency actions shall be kept on file in the main office of the agency for public inspection.

If the agency determines that such statement is required, the agency or the applicant at its option shall prepare or cause to be prepared a draft environmental impact statement. If the applicant

does not exercise the option to prepare such statement, the agency shall prepare it, cause it to be prepared, or terminate its review of the proposed action. Such statement shall describe the proposed action and reasonable alternatives to the action, and briefly discuss, on the basis of information then available, the remaining items required to be submitted by subdivision two of this section. The purpose of a draft environmental statement is to relate environmental considerations to the inception of the planning process, to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process in determining the environmental consequences of the proposed action. The draft statement should resemble in form and content the environmental impact statement to be prepared after comments have been received and considered pursuant to subdivision two of this section; however, the length and detail of the draft environmental statement will necessarily reflect the preliminary nature of the proposal and the early stage at which it is prepared.

The draft statement shall be filed with the department or other designated agencies and shall be circulated to federal, state, regional and local agencies having an interest in the proposed action and to interested members of the public for comment, as may be prescribed by the commissioner pursuant to section 8-0113.

5. After the filing of a draft environmental impact statement the agency shall determine whether or not to conduct a public hearing on the environmental impact of the proposed action. If the agency determines to hold such a hearing, it shall commence the hearing within sixty days of the filing and unless the proposed action is withdrawn from consideration shall prepare the environmental impact statement within forty-five days after the close of the hearing, except as otherwise provided. The need for such a hearing shall be determined in accordance with procedures adopted by the agency pursuant to section 8-0113 of this article. If no hearing is held, the agency shall prepare and make available the environmental impact statement within sixty days after the filing of the draft, except as otherwise provided.

Notwithstanding the specified time periods established by this article, an agency shall vary the times so established herein for preparation, review and public hearings to coordinate the environmental review process with other procedures relating to review and approval of an action. An application for a permit or authorization for an action upon which a draft environmental impact statement is determined to be required shall not be complete until such draft statement has been filed and accepted by the agency as satisfactory with respect to scope, content and adequacy for purposes of paragraph four of this section. Commencing upon such acceptance, the environmental impact statement process shall run concurrently with other procedures relating to the review and approval of the action so long as reasonable time is provided for preparation, review and public hearings with respect to the draft environmental impact statement.

6. To the extent as may be prescribed by the commissioner pursuant to section 8-0113, the environmental impact statement prepared pursuant to subdivision two of this section together with the comments of public and federal agencies and members of the public, shall be filed with the commmissioner and made available to the public prior to acting on the proposal which is the subject of the environmental impact statement.

7. An agency may charge a fee to an applicant in order to recover the costs incurred in preparing or causing to be prepared or reviewing a draft environmental impact statement or an environmental impact statement on the action which the applicant requests from the agency; provided, however, that an applicant may not be charged a separate fee for both the preparation and review of such statements. The technical services of the department may be made available on a fee basis reflecting the costs thereof, to a requesting agency, which fee or fees may appropriately be charged by the agency to the applicant under rules and regulations to be issued under section 8-0113.

8. When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the

environmental impact statement process will be minimized or avoided.

§ 8-0111. Coordination of reporting; limitations; lead agency

1. State and federal reports coordinated. Where an agency as herein defined directly or indirectly participates in the preparation of or prepares a statement or submits material relating to a statement prepared pursuant to the requirements of the National Environmental Policy Act of 1969, whether by itself or by another person or firm, compliance with this article shall be coordinated with and made in conjunction with federal requirements in a single environmental reporting procedure.

2. Federal report. Where the agency does not participate, as above defined, in the preparation of the federal environmental impact statement or in preparation or submission of materials relating thereto, no further report under this article is required and the federal environmental impact statement, duly prepared, shall suffice for the purpose of this article.

3. State and local coordination. Necessary compliance by state or local agencies with the requirements of this article shall be coordinated in accordance with section 8-0107 and with other requirements of law in the interests of expedited proceedings and prompt review.

4. Effective date of coordinated reporting. The requirements of the section with regard to coordinated preparation of federal and state impact materials and reporting shall not apply to statements prepared and filed prior to the effective date of this article.

5. Exclusions. The requirements of subdivision two of section 8-0109 of this article shall not apply to:

(a) Actions undertaken or approved prior to the effective date of this article, except:

(i) In the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative, in which case the commissioner may, at the request of any person or on his own motion, in a particular case, or generally in one or more classes of cases specified in rules and regulations, require the preparation of an environmental impact statement pursuant to this article; or

(ii) In the case of an action where the responsible agency proposes a modification of the action and the modification may result in a significant adverse effect on the environment, in which case an environmental impact statement shall be prepared with respect to such modification.

(b) Actions subject to the provisions requiring a certificate of environmental compatibility and public need in articles seven and eight of the public service law; or

(c) Actions subject to the class A or class B regional project jurisdiction of the Adirondack park agency or a local government pursuant to section eight hundred seven, eight hundred eight or eight hundred nine of the executive law.

6. Lead Agency. When an action is to be carried out or approved by two or more agencies, the determination of whether the action may have a significant effect on the environment shall be made by the lead agency having principal responsibility for carrying out or approving such action and such agency shall prepare, or cause to be prepared by contract or otherwise, the environmental impact statement for the action if such a statement is required by this article. In the event that there is a question as to which is the lead agency, any agency may submit the question to the commissioner and the commissioner shall designate the lead agency, giving due consideration to the capacity of such agency to fulfill adequately the requirements of this article.

§ 8-0113. Rules and regulations

1. After consultation with the other agencies subject to the provisions of this article, including state agencies and representatives of local governments and after conducting public hearings and review of any other comments submitted, the commissioner shall adopt rules and regulations implementing the provisions of this article within one hundred and twenty days after the effective date of this section.

2. The rules and regulations adopted by the commissioner specifically shall include:

(a) Definition of terms used in this article;

(b) Criteria for determining whether or not a proposed action may have a significant effect on the environment, taking into account social and economic factors to be considered in determining the significance of an environmental effect;

(c) Identification on the basis of such criteria of:

(i) Actions or classes of actions that are likely to require preparation of environmental impact statements;

(ii) Actions or classes of actions which have been determined not to have a significant effect on the environment and which do not require environmental impact statements under this article. In adopting the rules and regulations, the commissioner shall make a finding that each action or class of actions identified does not have a significant effect on the environment;

(d) Typical associated environmental effects, and methods for assessing such effects, of actions determined to be likely to require preparation of environmental impact statements;

(e) Categorization of actions which are or may be primarily of statewide, regional, or local concern, with provisions for technical assistance including the preparation or review of environmental impact statements, if requested, in connection with environmental impact review by local agencies.

(f) Provision for the filing and circulation of draft environmental impact statements pursuant to subdivision four of section 8-0109, and environmental impact statements pursuant to subdivision six of section 8-0109;

(g) Scope, content, filing and availability of findings required to be made pursuant to subdivision eight of section 8-0109;

(h) Form and content of and level of detail required for an environmental impact statement; and

(i) Procedures for obtaining comments on draft environmental impact statements, holding hearings, providing public notice of agency decisions with respect to preparation of a draft environmental statement; and for such other matters as may be needed to assure effective participation by the public and efficient and expeditious administration of the article.

(j) Procedure for providing applicants with estimates, when requested, of the costs expected to be charged them pursuant to subdivision seven of section 8-0109 of this article.

(k) Appeals procedure for the settlement of disputed costs charged by state agencies to applicants pursuant to subdivision seven of section 8-0109 of this article. Such appeal procedure shall not interfere or cause delay in the determination of environmental significance or prohibit an action from being undertaken.

(l) A model assessment form to be used during the initial review to assist an agency in its responsibilities under this article.

3. Within the time periods specified in section 8-0117 of this article the agencies subject to this article shall, after public hearing, adopt and publish such additional procedures as may be necessary for the implementation by them of this article consistent with the rules and regulations adopted by the commissioner.

(a) Existing agency environmental procedures may be incorporated in and integrated with the procedures adopted under this article, and variance in form alone shall constitute no objection thereto. Such individual agency procedures shall be no less protective of environmental values, public participation, and agency and judicial review than the procedures herein mandated.

(b) Such agency procedures shall provide for interagency working relationships in cases where actions typically involve more than one agency, liaison with the public, and such other procedures as may be required to effect the efficient and expeditious administration of this article.

§ 8-0115. Severability

The provisions of this article shall be severable, and if any clause, sentence, paragraph, subdivision or part of this article shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not effect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 8-0117. Phased implementation

1. With respect to the actions directly undertaken by any state agency, the requirement of an environmental impact statement pursuant to subdivision two of section 8-0109 of this article shall take effect on the first day of September, nineteen hundred seventy-six.

2. With respect to actions or classes of actions identified by the department as likely to require preparation of environmental impact statements pursuant to subparagraph (i) of paragraph (c) of subdivision two of section 8-0113 of this article directly

undertaken by any local agency, whether or not such actions are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more state agency; and all other actions or classes of actions identified by the department as likely to require preparation of environmental impact statements pursuant to subparagraph (i) of paragraph (c) of subdivision two of section 8-0113 of this article supported in whole or in part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more state agency, the requirement of an environmental impact statement pursuant to subdivision two of section 8-0109 of this article shall take effect on the first day of June nineteen hundred seventy-seven.

3. With respect to actions or classes of actions identified by the department as likely to require preparation of environmental impact statements pursuant to subparagraph (i) of paragraph (c) of subdivision two of section 8-0113 of this article supported in whole or in part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more local agency; and with respect to actions or classes of actions identified by the department as likely to require preparation of environmental impact statements pursuant to subparagraph (i) of paragraph (c) of subdivision two of section 8-0113 of this article involving the issuance to a person of a lease, permit, certificate or other entitlement for use or permission to act by one or more state or local agency, the requirement of an environmental impact statement pursuant to subdivision two of section 8-0109 of this article shall take effect on the first day of September, nineteen hundred seventy-seven.

4. With respect to all other actions not included in subdivision two or three of this section which are subject to this article, the requirement of an environmental impact statement pursuant to subdivision two of section 8-0109 of this article shall take effect on the first day of November, nineteen hundred seventy-eight.

5. Agencies subject to this article shall adopt and publish the additional necessary procedures described in subdivision three of section 8-0113 of this article, as follows:

(a) With respect to actions included within subdivision one of this section, no later than August 1, 1976.

(b) With respect to actions included within subdivision two of this section no later than April 1, 1977.

(c) With respect to actions included within subdivision three of this section, no later than July 1, 1977.

(d) With respect to actions included within subdivision four of this section, no later than November 1, 1978.

Any agency which has not adopted and published the additional necessary procedures described in subdivisions two and three of section 8-0113 of this article according to the dates set forth in this section shall utilize those procedures found in Part 617 of title six (environmental conservation) of the official compilation of the codes, rules and regulations of the state of New York for purposes of implementing this article until such time as such agency has adopted and published its own procedures.

APPENDIX D

Page

SEQRA FINDINGS STATEMENT -
KARNER MEADOWS SUBDIVISION,
CITY OF ALBANY PLANNING BOARD
DATED AUGUST 12, 1986 54-62

SEQR FINDINGS STATEMENT – KARNER MEADOWS SUBDIVISION

City of Albany Planning Board
August 12, 1986

Preliminary Statement

This subdivision request was originally submitted during August of 1984. On September 18, 1984, after having coordinated lead agency, the City Planning Board issued a positive declaration of environmental significance requiring that an Environmental Impact Statement be prepared.

A draft EIS was prepared and accepted as complete by the Board on October 9, 1984. A public hearing on the draft EIS was held on November 15, 1984 and comments were accepted until December 7, 1984.

The final EIS was submitted and accepted as complete by the Planning Board on June 18, 1985. A supplement to the final EIS was accepted on July 30, 1985 and distributed to all involved agencies.

During August of 1985 the City Planning Board made a decision to withhold final action on various development proposals in the Albany Pine Bush pending the completion of a generic EIS.

On February 25, 1986 a draft Generic Environmental Impact Statement was accepted as complete and a public hearing was held on March 13, 1986. In response to comments received, a Final Generic Environmental Impact Statement was prepared and accepted on June 4, 1986.

This generic EIS examined the cumulative impacts associated with development and preservation of the City of Albany Pine Bush within the framework of the State Environmental Quality Review Act (SEQR). Identifiable impacts and appropriate mitigating strategies are reviewed for nine specific development proposals including Karner Meadows, and for selected comprehensive cumulative alternatives encompassing varying degrees

of development and preservation. Long term management options for preservation areas were also presented.

FINDINGS

Over 2,000 acres of publicly owned land has been assembled in the Albany Pine Bush. Approximately 1,700 of these acres at a minimum are or will be permanently dedicated as preserve. This preserve is being established to protect a rare pine barrens ecotype which is typified by the pitch pine/scrub oak association. The vast majority of the acreage within the primary and secondary "take lines" established by the N.Y.S. Natural Heritage Program is already in preserve or funding has been committed for its purchase.

A highly valued attribute of any pine barrens ecology is the unique species diversity which it supports. A primary concern in the Albany Pine Bush is the potential reduction of species diversity which could result from the habitat loss associated with development in and around the remaining unprotected Pine Bush lands. It is virtually impossible to establish a threshold preserve size that represents a numerical minimum amount of acreage necessary to maintain existing species diversity. Establishing a quantitative relationship between the stability of various populations and required preserve areas would involve exhaustive scientific study clearly outside the scope of a generic EIS.

Nor can it clearly be demonstrated that further development will cause the loss (extirpation) of certain species, or that a prohibition on development will insure the survival of all existing species within the Pine Bush. However, it is reasonable to conclude that continued development of areas not within the preserve will contribute to habitat loss which may place additional stress on species which appear to be at risk in the Albany Pine Bush.

New development, which inherently involves land disturbance and habitat loss, also provides for community needs regarding housing, commercial space, retail or institutional services, etc. In the case of the Albany City portion of the Pine Bush, it has also been clearly demonstrated that the municipal revenues

associated with new development far outweigh the municipal costs associated with providing services to this development, thus in purely economic terms, new development has a decidedly positive impact. Nonetheless, in the Albany Pine Bush the value placed on development is in direct conflict with and must be weighed against the value placed on preservation of a rare pine barrens ecotype. Due to the environmentally sensitive nature of the Pine Bush ecology and the need for maintenance, including prescribed burning, acquisition to establish large contiguous preserve parcels which can be properly managed is the only viable method of preservation.

Local governments in New York State regulate land use through zoning; however, if the use of land is to be so restricted that all reasonable private use is prohibited then this constitutes a taking of property and the private property owners must be fairly compensated. Large Pine Bush tracts have been, or are in the process of being purchased to take private property and preserve certain areas with high preservation value. Decisions will continue to be made by governmental entities to either acquire Pine Bush parcels for preserve, to allow parcels to be intensely developed or to require parcels to be non-intensely developed with or without preserve set asides.

All of the municipalities which encompass portions of the Pine Bush, the County of Albany, the NYS Department of Environmental Conservation, Transportation and the NYS Office of Parks, Recreation and Historic Preservation were involved in the preparation of the generic EIS document and now have the final GEIS available as an information source to guide their decision making process.

The GEIS concludes that there remains three parcels in the Pine Bush, outside of current or proposed preservation areas, which due to their ecological characteristics, should be considered for acquisition and preservation if a policy decision is made by any private and governmental entity to supply funding for further acquisition. The 30 acre Madison Avenue Office Park parcel, the 72 acre Pine Valley site and 121 acre Karner Meadows subdivision site, in this order of priority are the three candidates so designated.

The ecological significance of the Karner Meadows parcel is discussed in both the site specific and generic EIS's. The difficulties surrounding proper management (prescribed burning) of this "island" are also discussed at length in both documents. Based on comments received on the draft EIS during October, 1984, the City of Albany inquired to the State of New York as to the availability of funds for the acquisition of the Karner Meadows site. A letter dated April 22, 1985 was received from Commissioner Henry G. Williams, NYS Department of Environmental Conservation declining the City's request that State funds be considered for further preservation within the Karner Meadows site, although a funding source did exist within the department at that time.

During a meeting held on July 12, 1986 representatives of the NYS Office of Parks, Recreation and Historic Preservation indicated that Environmental Quality Bond Act funds, or other funding sources available through their office do not exist which could be utilized for acquisition of the Karner Meadows parcel. The NYS Department of Environmental Conservation was contacted once more during June of 1986 to appraise them of the Karner Meadows proposal. Commissioner Williams indicated once again, in a letter dated July 7, 1986 that his department does not have access to acquisition funds that would allow purchase of this site.

It has been suggested that 1986 Environmental Quality Bond Act funds may be available for additional Pine Bush acquisitions, particularly the Karner Meadows site. The site specific Karner Meadows EIS and the generic EIS were made available to the New York State Department of Environmental Conservation and New York State Office of Parks Recreation and Historic Preservation, among others. These agencies are fully aware of the ecological quality of this site, the apparent difficulties surrounding management of the site, the potential cost of acquisition (approximately two million dollars), and the pending development proposal.

Upon inquiring as to the availability of funds, the City has been informed by the Commissioner of the Department of Environmental Conservation that funds for the acquisition of this site

would not be available "within the forseeable future," and further that "it is not possible at this time to tell whether the Bond Act could be used for Karner Meadows." Nor do we have any reason to believe that the property owners would be interested in negotiating such a sale even if funding were available and a commitment was made to seek acquisition of this site at some future date.

The Benacquista, Polisinelli & Serafini Management Corporation (BPS) proposes to construct a residential subdivision of 234 single family homes on this parcel of 121 acres located in the Albany Pine Bush. The current zoning (R-1) is appropriate for the development and the proposal is adjacent to other residential developments including the Dunes Subdivision to the northwest and the Velina Drive neighborhood to the south in Guilderland. The project would contribute to an identified public need for housing in Albany and would strengthen the residential character of the area. Additionally, the development would utilize existing municipal improvements which were installed to service development of this site and others within the vicinity.

Development of the project would reduce the aesthetic value of the site as undeveloped Pine Bush land. The proposed subdivision plat contains 37.7 acres of the best quality Pine Bush terrain to be preserved and donated to the City of Albany for appropriate management. The subdivision site is surrounded by other developments and is relatively distant (more than one half mile) from the large contiguous tracts of preservation land which have been publicly acquired to provide conservation and preservation of characteristic Pine Bush lands. Development of the subdivision would not adversely impact the ability to properly manage established primary preservation tracts. In fact, the location and configuration of the 37.7 preserve parcel has been so designed to allow contiguous parcels to be added to this preserve island so that it ultimately contains 90+ acres and provides a linkage to the primary preserve parcel to the west.

Land clearing for roadways and building sites would necessarily result in the loss of vegetation on the cleared areas and an attendant reduction in wildlife habitat. These impacts would be

mitigated by the phasing of construction in stages over approximately ten years and by a provision of on-site open space preservation areas. Phasing will allow emigration of more mobile species and will reduce the stress related to increased competition in surrounding areas. Many of the birds, insects and smaller mammals may return to the landscaped and revegetated areas, although probably in lesser numbers. Existing wildlife will be able to remain in the preservation areas although the carrying capacity of the site as a whole will be reduced.

All storm water runoff will be recharged on-site to the sandy upper aquifer by means of gallery drains, seepage pits and permeable asphalts. All water consumption will be serviced by public water supply with no wells drawing down the aquifer. Consequently no groundwater depletion or significant effect upon groundwater elevation is expected. Consequently groundwater flows needed to sustain off-site stream flow will not be affected. Calculations have been performed to evaluate potential pollutant concentrations associated with motor vehicle traffic and lawn fertilization. These calculations indicate that no contravention of applicable groundwater quality standards will result from this project. No wetlands or other water bodies exist on site.

Short term impacts include items normally associated with construction near existing developments such as equipment noise and the possibility of increased airborne dust. Blowing sand has sometimes been a problem in Pine Bush developments. Also, a safety hazard can be created by dune excavations which leave unprotected sand cliffs. Phased clearing of minimum necessary areas and subsequent revegetation will reduce or eliminate blowing sand problems; the proposed layout does not entail hillside excavations which would result in the formation of cliffs; all major dunes on the site will be preserved.

The Generic and site specific environmental impact statements document the potential negative impacts on the vehicular transportation system associated with the traffic generated by the Karner Meadows proposal and other new development. The documents also propose the traffic improvements which would

mitigate these impacts and provide for acceptable levels of service. The development process is a dynamic one which makes it impossible to predict exactly when certain development proposals and their associated traffic generation will be realized. Consequently a need will exist to continue monitoring traffic volumes and to plan improvements accordingly. The Capital District Transportation Committee is currently in the process of preparing a Pine Bush Transportation Plan which will continue to investigate potential traffic impacts, recommend specific transportation improvements and advance mitigation by co-ordinating implementation of various improvements.

Public acquisition and preservation of over 1700 acres of land in the Albany Pine Bush is being performed to mitigate the overall impacts of development on the Pine Bush ecology.

The following mitigating measures have been incorporated into this proposed project as a result of the environmental review process:

1. The total preservation acreage has been increased to 37.7 acres, (31%).
2. The preservation area is one contiguous parcel rather than two separate parcels.
3. The major portion of existing Karner blue butterfly habitat is preserved.
4. The number of proposed single family homes has been reduced from 248 to 234.
5. The lots proposed for Linwood Court (at the base of a sand dune known as Blueberry Hill) have been relocated to within the parcel formerly proposed as an active recreation area.
6. Development of the site will be phased to limit build out and vegetation removal/habitat loss to one portion of the site at a time.

Thorough review of the proposed design parameters, mitigating measures, and feasible alternatives indicate that the proposed project is consistent with social, economic, and other essential considerations. To the maximum extent practicable, adverse environmental effects revealed in the environmental review process will be minimized or avoided by incorporating as

conditions to the decision those mitigative measures which were identified as practicable.

These changes have been made to reduce potential negative impacts on the Pine Bush ecology and relate principally to visual aesthetics and impacts on vegetation and wildlife. These changes will also reduce the total number of vehicle trips generated by the project. No changes have been made which would tend to increase any potentially adverse impacts.

The requirements of Article 8 of the New York State Environmental Conservation Law, and regulations promulgated thereunder at 6 NYCRR Part 617, have been met and fully satisfied.

Supreme Court, U.S.
FILED
MAY 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1572

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

BENACQUISTA, POLSINELLI AND SERAFINI MANAGEMENT CORP.,

Petitioner,

-against-

SAVE THE PINE BUSH, INC.; REZIN ADAMS, JOHN WOLCOTT, GREGORY BELL, MARK PLAAT, LYNNE JACKSON and GENE DAMM, as Officers, Individuals, and Taxpayers,

Respondents.

On Petition For A Writ of Certiorari To Review The Judgment Of The Appellate Division, Third Department, Of The State Of New York.

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondents, Save the Pine Bush, et al., respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the New York State Supreme Court,

Appellate Division, Third Department, in this case. That opinion is reported at 130 AD2d 1, and the New York Court of Appeals denied leave to appeal on October 22, 1987, and December 23, 1987.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THE DECISION BELOW IS NOT FINAL AND THE PETITION FOR A WRIT OF CERTIORARI IS PREMATURE BECAUSE THERE HAS BEEN NO FINAL DISAPPROVAL OF THE SUBDIVISION.

It is well established that "an essential prerequisite" of a regulatory takings claim under the Just Compensation Clause of the Fifth Amendment "is a final and authoritative determination of the type and intensity of development legally permitted on the subject property". MacDonald, Sommer & Frates v. Yolo County, _____ US _____, 106 S.Ct. 2561, 2566 (1986).

This Court has examined the regulatory taking question "by engaging in essentially ad hoc. factual inquiries that have identified several factors -- such as the economic impact of the regulation, its interference

with reasonable investment-backed expectations, and the character of the governmental action -- that have particular significance". MacDonald, Sommer & Frates v. Yolo County, supra, _____ US at _____, 106 S.Ct. at 2566, quoting, Kaiser Aetna v. United States, 444 US 164, 175 (1979). Until a final decision about the type and intensity of development that will be permitted has been obtained, it is impossible for any court to engage in the factual inquiry and apply these factors to a particular regulatory decision to determine whether there has been a taking, that is, whether the regulation "goes too far". See MacDonald, Sommer & Frates v. Yolo County, supra, _____ US at _____, 106 S.Ct. at 2566; Williamson County Regional Planning Commission v. Hamilton

Bank, 473 US 172, 189-190, fn. 11 (1985).

Review of the state court decision in this case is inappropriate because this Court has already considered the issue of whether a denial of a subdivision plan constitutes a taking without just compensation under the Fifth Amendment. In MacDonald, Sommer & Frates v. Yolo County, supra, this Court held that a claim that rejection of a subdivision proposal by a county planning commission constituted a taking without just compensation was premature because the petitioner had not yet received "the Board's 'final definitive position regarding how it will apply the regulations at issue to the particular land in question'". MacDonald, Sommer & Frates v. Yolo County, supra, _____ US at _____, 106 S.Ct. at 2568, quoting, Williamson County Regional Planning

Commission v. Hamilton Bank, supra, 473 US at 191. In MacDonald this Court rejected the idea that an agency denial of a particular subdivision plan was tantamount to a refusal to permit any and all development. 106 S.Ct. at 2568. "The implication is not that future application would be futile, but that a meaningful application has not yet been made." 106 S.Ct. at 2568, fn. 8.

Similarly, where a developer failed to seek a variance which might have allowed it to develop its property in accordance with its proposed subdivision plat and failed to utilize state procedures for just compensation, this Court rejected a takings claim as premature. Williamson County Regional Planning Commission v. Hamilton Bank, supra, 473 US at 189-90, 194; see also,

Agins v. City of Tiburon, 447 US 255, 260 (1980) (takings claim was premature where appellant failed to submit a subdivision plan and instead challenged the zoning ordinances as facially unconstitutional).

In the instant case, the petitioner lacks a final determination of what type and intensity of development will be permitted on the subject property. Petitioner has had no final rejection of its subdivision plat. All that has happened is that the City of Albany Planning Board's decision approving the Karner Meadows residential subdivision plat has been vacated pending submittal of a Final Generic Environmental Impact Statement (hereinafter "FGEIS") that meets the requirements of New York State's Enviromental Quality Review Act (hereinafter "SEQRA"). Matter of Save

the Pine Bush v. Planning Board of the City of Albany, 130 AD2d 1, at 3 (3rd Dept. 1987). Here, the New York courts determined that SEQRA's requirement that the reviewing agency take a "hard look" at the relevant areas of environmental concern was not met without considering the question of the minimum number of acres that the Karner Blue Butterfly, an endangered species, needs in order to survive. Id. at 3-4. SEQRA requires that an adequate environmental impact statement be submitted with an application for approval of a significant "action" such as the subdivision plat herein, and the meaning of the decision below is that the petitioner's application to the Albany Planning Board was deficient. Compare Williamson County Regional Planning Commission v. Hamilton Bank, supra, 473

US at 188-191. When petitioner prepares an adequate FGEIS which addresses the issue of minimum preserve necessary for survival of the endangered species, the petitioner may reapply to the Planning Board of the City of Albany for approval of the same or a different subdivision plat, and then approval of the original or a modified subdivision may be obtained. Id. at 3.

In MacDonald, where appellant had submitted only one subdivision proposal to the County Planning Commission and received a rejection, this Court found consideration of the takings claim was precluded because it was premature. MacDonald, Summer & Frates, supra, _____ US at _____, 106 S.Ct. at 2568. In Agins, this Court found the takings claim premature when appellants failed to submit a subdivision plan and

instead made a facial challenge to the constitutionality of the statute. Agins v. City of Tiburon, supra, 447 US at 260. Here, since there is no way for the courts to know the nature and extent of what development will be permitted on the Karner Meadows property, without a final decision by the Planning Board of the City of Albany, it is not appropriate, or even possible, to adjudicate the constitutional claim at this time. MacDonald, Sommer & Frates, supra, _____ US _____, 106 S.Ct. at 2567.

Petitioner here may resubmit a new subdivision plat with an FGEIS conforming with the directives of the state courts. As SEQRA does not require any particular result as to approval or disapproval of an application [Matter of Jackson v. New York State Urban

Development Corporation, 67 NY2d 400, 417 (1986)], there is no reason for petitioner to claim at this stage the Albany Planning Board will not allow development of its subdivision plat upon submission of an adequate application. The holdings of the New York courts leave open the possibility that substantial development will be permitted on this property upon proper application, and therefore the claim is premature. MacDonald, Summer & Frates v. Yolo County, supra, ____ US at ____, 106 S.Ct. at 2568. This case is a straight forward application of this Court's previous decisions in MacDonald, Williamson, and Agins, and thus does not merit further review.

POINT II

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION BELOW CORRECTLY INTERPRETS AND APPLIES THE PREVIOUS DECISIONS OF THIS COURT IN THAT THE REQUIREMENT OF AN ENVIRONMENTAL IMPACT STATEMENT WHICH ADDRESSES THE QUESTION OF THE MINIMUM ACREAGE NECESSARY FOR SURVIVAL OF THE KARNER BLUE BUTTERFLY SUBSTANTIALLY ADVANCES THE LEGITIMATE STATE INTEREST OF PRESERVING AN ENDANGERED SPECIES.

The decision below is consistent with the previous decisions of this Court with respect to takings under the Just Compensation Clause of the Fifth Amendment. This Court has "long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'". Nollan v. California Coastal Commission, 483 US _____, 97 L.Ed.2d 677, 687

(1987), quoting, Agins v. City of Tiburon, 447 US 255, 260 (1980).

This case is a typical environmental case in which a landowner has been temporarily denied the use of land that he prefers--construction of a large, dense, residential subdivision--because he failed to provide complete enough information to satisfy the requirements of the New York environmental review law, SEQRA. Any other uses not requiring submission of an environmental impact statement (hereafter "EIS") are available to the petitioner, and he is free to submit a new application for the same subdivision plat with a new EIS.

The State court's resolution of the issue below was consistent with first prong of Nollan's takings analysis in that the land use regulation does substantially advance a legitimate state

interest. Nollan, supra, 483 US at _____, 97 L.Ed.2d at 687. The land use regulation here is the requirement that an application for a subdivision plat approval be accompanied by an adequate EIS, and this requirement does advance the legitimate state interest of protecting an endangered species, the Karner Blue Butterfly.

In Euclid v. Ambler Realty Co. this Court acknowledged the importance of residential zoning as a legitimate state interest which justifies regulatory control over land use by a property owner. Euclid v. Ambler Realty Co., 273 US 365, 391 (1926).

In Penn Central Transportation Co. v. New York City, this Court acknowledged the importance of landmark preservation as a legitimate state interest and held that the regulation

therein did not constitute a taking. Penn Central Transportation Co. V. New York City, 438 US 104, 129 (1978).

In Agins v. City of Tiburon, this Court found scenic zoning was a legitimate state interest and valid exercise of the police power to protect residents from the ill effects of urbanization. Agins v. City of Tiburon, 447 US 255, 261 (1980). Recently this Court has noted that a broad range of governmental purposes are legitimate State interests. Nollan v. California Coastal Commission, supra, _____ US _____, 97 L.Ed.2d 677, 688 (1987).

In view of the high priority the United States Congress has attached to the protection of endangered species, this Court has held that protection of such endangered species is a legitimate matter of federal concern. See,

Endangered Species Act of 1973, 16 USC §1531 et. seq.; Tennessee Valley Authority v. Hill, 437 US 153, 174 (1978) (Congress intended protection of endangered species, snail darter, to be afforded the highest priority).

The New York Legislature has enacted a state endangered species act [17 1/2 McKinney's Laws of New York, Environmental Conservation Law, Sec. 11-0535]. And the Karner Blue Butterfly, which resides in the Albany Pine Bush, has been designated as an endangered species pursuant to the State Act. 6 Codes Rules and Regulations of the State of New York, Sec. 182.6(a). The court below correctly noted that preservation of the endangered species was the State interest that is being protected, and the court below clearly articulated the direct relationship between an EIS and

the goal of protecting an endangered species:

> [H]ere the Legislature has taken pains to express heightened environmental concern for the Karner Blue butterfly, whose continued existence depends upon the preservation of its singular habitat, by according it endangered species status. If the Legislature's concern is to be respected, as it must be, then the question of minimum acreage needed to ensure the survival of the endangered species and its habitat is to be resolved. In the light of this, the Board's authorization of maximum development of the land involved, without offering any empirical data or other satisfactory documentation to resolve the minimum acreage issue, was an arbitrary and capricious act.
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> Matter of Save the Pine Bush, Inc. v. Planning Board of the City of Albany, 130 AD2d 1, 4 (3rd Dept. 1987).

As in the case of the Federal Endangered Species Act, protection of the Karner

Blue Butterfly is a legitimate state interest.

In Nollan this Court required a nexus between the state regulatory purpose and the means used to achieve that purpose in order to withstand a takings challenge under the Fifth Amendment. Nollan v. California Coastal Commission, supra, 483 US at _____, 97 L.Ed.2d at 689. In this instance the New York courts have clearly acted in conformity with this Court's requirements in takings cases by requiring a direct relationship between the goal of protection of an endangered species and the means utilized.

The requirement of an EIS which addresses the issue of the minimum acreage substantially advances the purpose of protecting the Karner Blue Butterfly. Under New York law an EIS is:

> "intended to provide detailed information about the effect which the proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action. The EIS is to be viewed as an environmental 'alarm bell' whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return."
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> Town of Henrietta v. Department of Environmental Conservation of New York, 76 AD2d 215, 220 (4th Dept. 1980)

In the instant case, the court below has required that the developer, who seeks to build a subdivision in an area which is the habitat of an endangered species, prepare an EIS to assess the habitat size that is necessary to ensure

the species survival. The state courts took seriously their duty under SEQRA to determine whether the Albany City Planning Board identified the relevant area of environmental concern, the threat to the survival of the Karner Blue Butterfly, "and made a reasoned elaboration of the basis for its determination". Matter of Save the Pine Bush, Inc. v. Planning Board of the City of Albany, supra, 130 AD2d 1, at 3.

The court below clearly articulated the direct relationship between the requirement of an EIS and the goal of protecting an endangered species:

> While respondents and BPS suggest that resolution of this issue is "outside the scope of a generic EIS [environmental impact statement]", we deem it precisely the kind of environmental issue that needs to be evaluated when, as here, the habitat of an

> endangered species is at risk (6 NYCRR 182.6[a][2]) and the municipality has opted for maximum development of the land area involved without proposing any substantively salutary mitigating measures which would minimize the adverse environmental effect of its decision; to allow the Board to do otherwise would frustrate the objectives of SEQRA.
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> Matter of Save the Pine Bush, Inc. v. Planning Board of the City of Albany, supra, 130 AD2d at 4.

In conformity with the precedents of this Court, the requirment of an FGEIS that addresses the question of the minimum number of acres necessary for survival of the Karner Blue Butterfly is tailored to achieve the legitimate state interest sought to be protected by the objectives of SEQRA. Nollan v. California Coastal Commission, supra, 493 US at _____, 97 L.Ed.2d at 670.

Since the New York courts have

adhered to decisions of this Court in fashioning a remedy under SEQRA that is directly related to the legitimate state interest, no new constitutional principle would be advanced by granting certiorari in this case.

Similarly, the lower court carefully avoided "going too far" in denying petitioner use of his land so as to effect an unconstitutional taking. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 US _____, 96 L.Ed.2d 250, 265 (1987). This Court has consistently stated that a landowner must be denied "all economically viable use" of his property before a takings claim is established. Nollan v. California Coastal Commission, supra, 483 US at _____, 97 L.Ed.2d at 287; Agins v. City of Tiburon, supra, 447 US at 260;

MacDonald, Sommer & Frates v. Yolo County, supra, _____ US _____, 106 S.Ct. at 2566 (land that retains any "reasonable beneficial use" has not been "taken" under the Fifth Amendment).

Here, there is no allegation of a physical occupation of the property upon which the Karner Meadows subdivision is proposed to be constructed, nor has the petitioner been required to convey an easement or other recognized property interest. The right to construct residential subdivision has not even been denied to the petitioners, it has been required only that the petitioner must first prepare an adequate EIS. Nollan v. California Coastal Commission, supra, 483 US at _____, 97 L.Ed.2d at 686.

Petitioner has attempted to satisfy the second prong of the Nollan test by

the conclusory allegation that requiring an EIS which addresses the question of the minimum acreage necessary for survival of the Karner Blue Butterfly itself "destroys any economically viable use of the property". Petitioner's Brief, at p. 17. This argument presents no new issue for resolution since this Court has already held that denial of a particular subdivision plan for a property does not effect an unconstitutional taking. In rejecting a takings claim, this Court has stated that the rejection of a subdivision plan did not destroy all uses of the property since other development is consistent with the county's general plan could occur. MacDonald, Sommer & Frates v. Yolo County, supra, _____ US _____, 106 S.Ct. at 2568-2569.

In the instant case, no

unconstitutional taking occurred because the Karner Meadows residential subdivision as it has been proposed may very well be approved after submittal of an EIS that addresses the minimum acreage issue and shows that the endangered species can survive. Or, since SEQRA does not require any particular result [Matter of Jackson v. New York State Urban Development Corporation, supra, 67 NY2d at 417], the Planning Board of the City of Albany may decide to approve the subdivision even though it will result in the extinction of the Karner Blue Butterfly.

In requiring only that a "hard look" first be taken at the survival of the endangered species, the courts below have not achieved a result in any way inconsistent with the settled precedent of this Court.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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